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UNITED STATES DISTRICT COURT
DISTRICT OF NEVADA

* * *

MAURICE DANIEL JAMES TALLEY,	Case No. 2:16-cv-00957-APG-VCF
Petitioner,	ORDER
v.	
D.W. NEVENS, et al.,	
Respondents.	

This *pro se* 28 U.S.C. § 2254 habeas petition by Maurice Daniel James Talley is before the court for adjudication on the merits (ECF No. 1).

I. Background & Procedural History

On November 21, 2013, Talley pleaded guilty to attempted murder with use of a deadly weapon (exhibit 11).¹ His attorneys had negotiated a global resolution of Talley’s four felony criminal cases; as a result, the State dismissed 40 felony charges.² In this case (no. C287805), the state district court sentenced him to 96 to 240 months, with a consecutive term of 96 to 240 months for the deadly weapon enhancement, with 355 days’ credit for time served. Exh. 16. The court entered the judgment of conviction on January 24, 2014. *Id.*

¹ Exhibits referenced in this order are exhibits to respondents’ answer to the petition, ECF No. 14, and are found at ECF Nos. 15-16.
² Respondents set forth the charges in the four cases in their answer (ECF No. 14, pp. 2-3). In the guilty plea agreement, Talley also agreed to plead guilty to first-degree kidnapping and robbery with use of a deadly weapon (case no. C287665), and robbery (case no. C288339). The State agreed to dismiss all charges in case no. 13FN0362C. *Id.*

1 Talley did not file a direct appeal. On December 18, 2015, the Nevada Court of
2 Appeals affirmed the denial of Talley's state postconviction habeas corpus petition, and,
3 after denying a motion for rehearing, remittitur issued on April 7, 2016. Exhs. 52, 59,
4 60.

5 On or about April 20, 2016, Talley dispatched his federal habeas petition for mailing
6 (ECF No. 1). Respondents have now answered the petition, and Talley replied (ECF
7 Nos. 52, 55).

8 **II. Legal Standards**

9 **a. Antiterrorism and Effective Death Penalty Act (AEDPA)**

10 28 U.S.C. § 2254(d), a provision of the Antiterrorism and Effective Death Penalty
11 Act (AEDPA), provides the legal standards for this court's consideration of the petition in
12 this case:

13 An application for a writ of habeas corpus on behalf of a person in
14 custody pursuant to the judgment of a State court shall not be granted with
15 respect to any claim that was adjudicated on the merits in State court
proceedings unless the adjudication of the claim —

16 (1) resulted in a decision that was contrary to, or involved an
17 unreasonable application of, clearly established Federal law, as
determined by the Supreme Court of the United States; or

18 (2) resulted in a decision that was based on an unreasonable
19 determination of the facts in light of the evidence presented in the State
court proceeding.

20 The AEDPA "modified a federal habeas court's role in reviewing state prisoner
21 applications in order to prevent federal habeas 'retrials' and to ensure that state-court
22 convictions are given effect to the extent possible under law." *Bell v. Cone*, 535 U.S.
23 685, 693-694 (2002). This Court's ability to grant a writ is limited to cases where "there
24 is no possibility fair-minded jurists could disagree that the state court's decision conflicts
25 with [Supreme Court] precedents." *Harrington v. Richter*, 562 U.S. 86, 102 (2011). The
26 Supreme Court has emphasized "that even a strong case for relief does not mean the
27 state court's contrary conclusion was unreasonable." *Id.* (citing *Lockyer v. Andrade*, 538
28 U.S. 63, 75 (2003)); *see also Cullen v. Pinholster*, 563 U.S. 170, 181 (2011) (describing

1 the AEDPA standard as “a difficult to meet and highly deferential standard for evaluating
2 state-court rulings, which demands that state-court decisions be given the benefit of the
3 doubt”) (internal quotation marks and citations omitted).

4 A state court decision is contrary to clearly established Supreme Court
5 precedent, within the meaning of 28 U.S.C. § 2254, “if the state court applies a rule that
6 contradicts the governing law set forth in [the Supreme Court’s] cases” or “if the state
7 court confronts a set of facts that are materially indistinguishable from a decision of [the
8 Supreme Court] and nevertheless arrives at a result different from [the Supreme
9 Court’s] precedent.” *Lockyer*, 538 U.S. at 73 (quoting *Williams v. Taylor*, 529 U.S. 362,
10 405-06 (2000), and citing *Bell*, 535 U.S. at 694.

11 A state court decision is an unreasonable application of clearly established
12 Supreme Court precedent, within the meaning of 28 U.S.C. § 2254(d), “if the state court
13 identifies the correct governing legal principle from [the Supreme Court’s] decisions but
14 unreasonably applies that principle to the facts of the prisoner’s case.” *Lockyer*, 538
15 U.S. at 74 (quoting *Williams*, 529 U.S. at 413). The “unreasonable application” clause
16 requires the state court decision to be more than incorrect or erroneous; the state
17 court’s application of clearly established law must be objectively unreasonable. *Id.*
18 (quoting *Williams*, 529 U.S. at 409).

19 To the extent that the state court’s factual findings are challenged, the
20 “unreasonable determination of fact” clause of § 2254(d)(2) controls on federal habeas
21 review. *E.g.*, *Lambert v. Blodgett*, 393 F.3d 943, 972 (9th Cir.2004). This clause
22 requires that the federal courts “must be particularly deferential” to state court factual
23 determinations. *Id.* The governing standard is not satisfied by a showing merely that the
24 state court finding was “clearly erroneous.” 393 F.3d at 973. Rather, AEDPA requires
25 substantially more deference:

26
27 [I]n concluding that a state-court finding is unsupported by
28 substantial evidence in the state-court record, it is not enough that we
would reverse in similar circumstances if this were an appeal from a
district court decision. Rather, we must be convinced that an appellate

1 panel, applying the normal standards of appellate review, could not
2 reasonably conclude that the finding is supported by the record.

3 *Taylor v. Maddox*, 366 F.3d 992, 1000 (9th Cir.2004); *see also Lambert*, 393
4 F.3d at 972.

5 Under 28 U.S.C. § 2254(e)(1), state court factual findings are presumed to be
6 correct unless rebutted by clear and convincing evidence. The petitioner bears the
7 burden of proving by a preponderance of the evidence that he is entitled to habeas
8 relief. *Cullen*, 563 U.S. at 181. Finally, in conducting an AEDPA analysis, this court
9 looks to the last reasoned state-court decision. *Murray v. Schriro*, 745 F.3d 984, 996
10 (9th Cir. 2014).

11 **b. Ineffective Assistance of Counsel**

12 Ineffective assistance of counsel claims are governed by the two-part test
13 announced in *Strickland v. Washington*, 466 U.S. 668 (1984). In *Strickland*, the
14 Supreme Court held that a petitioner claiming ineffective assistance of counsel has the
15 burden of demonstrating that (1) the attorney made errors so serious that he or she was
16 not functioning as the “counsel” guaranteed by the Sixth Amendment, and (2) that the
17 deficient performance prejudiced the defense. *Williams*, 529 U.S. at 390-91 (citing
18 *Strickland*, 466 U.S. at 687). To establish ineffectiveness, the defendant must show that
19 counsel’s representation fell below an objective standard of reasonableness. *Id.* To
20 establish prejudice, the defendant must show that there is a reasonable probability that,
21 but for counsel’s unprofessional errors, the result of the proceeding would have been
22 different. *Id.* A reasonable probability is “probability sufficient to undermine confidence in
23 the outcome.” *Id.* Additionally, any review of the attorney’s performance must be “highly
24 deferential” and must adopt counsel’s perspective at the time of the challenged conduct,
25 in order to avoid the distorting effects of hindsight. *Strickland*, 466 U.S. at 689. It is the
26 petitioner’s burden to overcome the presumption that counsel’s actions might be
27 considered sound trial strategy. *Id.*

1 Ineffective assistance of counsel under *Strickland* requires a showing of deficient
2 performance of counsel resulting in prejudice, “with performance being measured
3 against an objective standard of reasonableness, . . . under prevailing professional
4 norms.” *Rompilla v. Beard*, 545 U.S. 374, 380 (2005) (internal quotations and citations
5 omitted). When the ineffective assistance of counsel claim is based on a challenge to a
6 guilty plea, the *Strickland* prejudice prong requires a petitioner to demonstrate “that
7 there is a reasonable probability that, but for counsel’s errors, he would not have
8 pleaded guilty and would have insisted on going to trial.” *Hill v. Lockhart*, 474 U.S. 52,
9 59 (1985).

10 If the state court has already rejected an ineffective assistance claim, a federal
11 habeas court may only grant relief if that decision was contrary to, or an unreasonable
12 application of, the *Strickland* standard. See *Yarborough v. Gentry*, 540 U.S. 1, 5 (2003).
13 There is a strong presumption that counsel’s conduct falls within the wide range of
14 reasonable professional assistance. *Id.*

15 The United States Supreme Court has described federal review of a state
16 supreme court’s decision on a claim of ineffective assistance of counsel as “doubly
17 deferential.” *Cullen*, 563 U.S. at 190 (quoting *Knowles v. Mirzayance*, 129 S.Ct. 1411,
18 1413 (2009)). The Supreme Court emphasized that: “We take a ‘highly deferential’ look
19 at counsel’s performance . . . through the ‘deferential lens of § 2254(d).” *Id.* at 1403
20 (internal citations omitted). Moreover, federal habeas review of an ineffective assistance
21 of counsel claim is limited to the record before the state court that adjudicated the claim
22 on the merits. *Cullen*, 563 U.S. at 181-84. The United States Supreme Court has
23 specifically reaffirmed the extensive deference owed to a state court’s decision
24 regarding claims of ineffective assistance of counsel:

25
26 Establishing that a state court’s application of *Strickland* was
27 unreasonable under § 2254(d) is all the more difficult. The standards
28 created by *Strickland* and § 2254(d) are both “highly deferential,” *id.* at
689, 104 S.Ct. 2052; *Lindh v. Murphy*, 521 U.S. 320, 333, n.7, 117 S.Ct.
2059, 138 L.Ed.2d 481 (1997), and when the two apply in tandem, review
is “doubly” so, *Knowles*, 556 U.S. at —, 129 S.Ct. at 1420. The

1 *Strickland* standard is a general one, so the range of reasonable
2 applications is substantial. 556 U.S. at —, 129 S.Ct. at 1420. Federal
3 habeas courts must guard against the danger of equating
4 unreasonableness under *Strickland* with unreasonableness under §
5 2254(d). When § 2254(d) applies, the question is whether there is any
6 reasonable argument that counsel satisfied *Strickland's* deferential
7 standard.

8 *Harrington*, 562 U.S. at 105. “A court considering a claim of ineffective assistance
9 of counsel must apply a ‘strong presumption’ that counsel’s representation was within
10 the ‘wide range’ of reasonable professional assistance.” *Id.* at 104 (quoting *Strickland*,
11 466 U.S. at 689). “The question is whether an attorney’s representation amounted to
12 incompetence under prevailing professional norms, not whether it deviated from best
13 practices or most common custom.” *Id.* (internal quotations and citations omitted).

14 Where a petitioner pleaded guilty upon the advice of counsel, he “may only attack
15 the voluntary and intelligent character of the guilty plea by showing that the advice he
16 received from counsel was [ineffective] . . . and that there is a reasonable probability
17 that, but for counsel’s errors, he would not have pleaded guilty and would have insisted
18 on going to trial.” *Hill v. Lockhart*, 474 U.S. 52, 56-57, 59 (1985); *Lambert v. Blodgett*,
19 393 F.3d 943, 980-981 (9th Cir. 2004).

20 III. **Instant Petition**

21 **Ground 1**

22 Talley’s petition sets forth two grounds of ineffective assistance of counsel. In
23 ground 1, he contends that his counsel failed to conduct a proper and reasonable
24 investigation, which would have led to evidence of petitioner’s actual innocence. He
25 argues that counsel failed to interview a single witness, failed to move for the discovery,
26 and failed to review the discovery he did have, which contained vital inconsistencies
27 and exculpatory statements (ECF No. 1, p. 3). He further claims that surveillance video
28 demonstrated that he was at his mother’s home the night of the incident (ECF No. 1-1,
p. 7).

 Affirming the denial of his state postconviction petition, the Nevada Court of
Appeals held:

1
2 In the guilty plea agreement, Talley asserted he had discussed
3 possible defenses with his attorney, but that he believed a guilty plea was
4 in his own best interests. In addition, at the plea canvass, Talley
5 acknowledged he was the person who had fired gunshots at a home and
6 that he knew there were persons inside the home. Further, there was
7 strong evidence of Talley's guilt, as he had previously threatened to harm
8 persons who resided at the home, a witness viewed Talley shooting at the
9 residence, and another witness viewed Talley's vehicle during the
10 incident. We further note Talley did not demonstrate the surveillance
11 video actually demonstrated he was at his mother's home during the
12 incident, and therefore, failed to prove the factual allegations underlying
13 his claim. See *Means v. State*, 120 Nev. 1001, 1012, 103 P.3d 25, 32
14 (2004). Under these circumstances, Talley failed to demonstrate a
15 reasonable probability he would have refused to plead guilty and would
16 have insisted on trial had counsel further investigated this matter.

17 Exh. 52, p. 3.

18 The transcript of the grand jury proceedings reflects the following: Michael Coury
19 testified that he was in the car with Talley and Ezra Peoples when Talley pulled up in
20 front of the house, got out of the car and shot four or five times into the front window of
21 the house. Exh. 3, pp. 19-20. Coury stated that neither he nor Peoples got out of the
22 car during the incident. See *id.* at 22-24. Royann Briones testified that about 25 friends
23 and family members had gathered at her house on the night in question to watch
24 football and play poker when she suddenly saw smoke, saw people diving to the
25 ground, realized that someone was shooting, and was then struck by a bullet that came
26 through the window. *Id.* at 37-40. Briones suffered a "through and through" injury; she
27 stated that a bullet struck her in the left hip area and exited through her right abdomen,
28 requiring emergency surgery. Her husband, Ronald Twito, testified that he heard four
shots. *Id.* at 52-53. Dominique Lopez testified that she was upstairs in the house,
heard noises, looked outside and saw someone was shooting. Lopez stated that she
saw Talley's vehicle and that Talley had been to her home before and had threatened to

1 return with a gun. *Id.* at 68-69, 75-76. A police detective testified that he located four
2 bullet cartridge shell casings at the scene. *Id.* at 82.

3 The grand jury indicted Talley for battery with use of a deadly weapon resulting in
4 substantial bodily harm; 4 counts attempted murder with use of a deadly weapon; 9
5 counts assault with a deadly weapon; and 3 counts discharging firearm at or into a
6 structure. Exh. 4.

7
8 During the plea canvass, in response to the state district court's questioning,
9 Talley stated that he had had a full opportunity to discuss the single charge of attempted
10 murder with use of a deadly weapon in the amended indictment and the guilty plea with
11 all three of his attorneys, that he understood the rights he was waiving, and that he had
12 no questions. Exh. 13, pp. 3-6. He stated that he knew people were inside the house,
13 and he shot into the house with the intent to kill one or more people. *Id.*

14
15 Talley claims that his plea counsel was ineffective for failing to properly
16 investigate. Talley states that his mother had video surveillance footage that showed
17 that he was at her house the night of the shooting. However, respondents are correct
18 that, even if surveillance footage exists, he did not inform counsel about the video until
19 after he pleaded guilty (see ECF No. 1-1, p. 7), so it cannot be a basis for counsel to be
20 ineffective for advising Talley to enter into the plea agreement. Nor has Talley provided
21 any specifics about the video to demonstrate that it actually establishes his innocence.
22 Talley also makes the bare assertion in his federal petition that he told his counsel that
23 he was willing to plea in his other cases but wanted to go to trial on this case. This
24 claim strains credulity. Finally, Talley has failed to demonstrate any material
25 inconsistencies in the witnesses' testimony.
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1 **Ground 2**

2 Talley asserts that counsel failed to provide adequate consult and advice;
3 counsel told Talley to plead guilty without assessing the case, and counsel failed to
4 properly explain the consequences of the plea, including how the sentence would be
5 structured (ECF No. 1, p. 5).
6

7 The Nevada Court of Appeals concluded that this claim was belied by the record
8 because in both the guilty plea agreement and the plea canvass Talley acknowledged
9 that he had discussed the case with his counsel, including the rights he was waiving,
10 and that counsel had answered all of his questions. The court held that Talley failed to
11 show a reasonable probability that he would have refused to plead guilty and would
12 have insisted on going to trial had counsel further discussed the plea agreement with
13 him. Exh. 52, pp. 3-4.
14

15 The relevant part of the plea canvass proceeded as follows:

16 The Court: Well, you shot at a group of people, is that
17 true?

18 The Defendant: That's what it says.

19 The Court: Well, did you do it or not?

20 The Defendant: I'm pleading guilty, yeah.

21 The Court: Well if you didn't shoot at a group of people,
22 then you shouldn't be pleading guilty to this.

23 The Defendant: Maybe you should tell the D.A. that.

24 The Court: Okay. We – I can't accept our plea unless we
25 go through the elements, and you said you're pleading guilty to attempt
26 murder with use of a deadly weapon because, in truth and in fact, you are
27 guilty. Now you may not have known who all these people were, but was
there a group of people assembled together that had some men in the
group, one or more men, and one or more women in the group?

28 The Defendant: I guess, yes. Yes, yes I did.

1
2 The Court: Okay. And were – and did you shoot at or into
3 this group of people.

4 The Defendant: To the house.

5 The Court: Okay. You shot into the house, and at that time
6 you had reason to believe or to know that there would have been people
7 inside the house, is that true?

8 The Defendant: Yes, ma'am.

9 The Court: All right. And you didn't know exactly who was
10 in the house, but you knew that there were some people in the house.
11 True?

12 The Defendant: Yes.

13 The Court: Okay. And you shot into the house with the
14 intent to kill one or more people who may be in the house. Is that correct?

15 The Defendant: Yes.

16 The Court: All right. And the weapon, it's pretty obvious,
17 that you used to shoot into the house was a firearm. Is that correct?

18 The Defendant: Yes.

19 Exh. 13, pp. 6-7.

20 Talley argues that it is unreasonable to use his plea canvass as a basis to deny
21 his claims (ECF No. 1-1, p. 18). However, that is the very purpose of the plea canvass;
22 if a defendant has any confusion/questions/doubts about the guilty plea agreement, he
23 has the opportunity to inform the court during the canvass. Talley points out that at the
24 outset of the plea hearing, he equivocated as to whether or not he was guilty. Exh. 13,
25 p. 6. However, immediately thereafter, Talley acknowledged in response to the court's
26 questions that he shot into the house, knowing people were inside, with the intent to kill
27 one or more people. *Id.* at 7.
28

1 This court concludes that Talley has not shown that the decisions of the Nevada
2 Court of Appeals on federal grounds 1 and 2 were contrary to, or involved an
3 unreasonable application of, *Strickland*, or were based on an unreasonable
4 determination of the facts in light of the evidence presented in the state court
5 proceeding. 28 U.S.C. § 2254(d). Federal habeas relief is, therefore, denied as to
6 grounds 1 and 2. Accordingly, the petition is denied in its entirety.
7

8 IV. Certificate of Appealability

9 This is a final order adverse to the petitioner. As such, Rule 11 of the Rules
10 Governing Section 2254 Cases requires this court to issue or deny a certificate of
11 appealability (COA). Accordingly, the court has *sua sponte* evaluated the claims within
12 the petition for suitability for the issuance of a COA. See 28 U.S.C. § 2253(c); *Turner v.*
13 *Calderon*, 281 F.3d 851, 864-65 (9th Cir. 2002).
14

15 Pursuant to 28 U.S.C. § 2253(c)(2), a COA may issue only when the petitioner "has
16 made a substantial showing of the denial of a constitutional right." With respect to
17 claims rejected on the merits, a petitioner "must demonstrate that reasonable jurists
18 would find the district court's assessment of the constitutional claims debatable or
19 wrong." *Slack v. McDaniel*, 529 U.S. 473, 484 (2000) (citing *Barefoot v. Estelle*, 463
20 U.S. 880, 893 & n.4 (1983)). For procedural rulings, a COA will issue only if reasonable
21 jurists could debate (1) whether the petition states a valid claim of the denial of a
22 constitutional right and (2) whether the court's procedural ruling was correct. *Id.*
23

24 Having reviewed its determinations and rulings in adjudicating Talley's petition, the
25 court finds that reasonable jurists would not find its determination of any grounds to be
26 debatable pursuant to *Slack*. The court therefore declines to issue a certificate of
27 appealability.
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IT IS FURTHER ORDERED that a certificate of appealability is **DENIED**.

Dated: May 8, 2018.


ANDREW P. GORDON
UNITED STATES DISTRICT JUDGE